

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost)	
of Broadband Deployment by Improving)	
Policies Regarding Public Rights of Way and)	
Wireless Facilities Siting)	
)	
)	

**REPLY COMMENTS OF
THE CITY OF DAVIS, CALIFORNIA**

I. INTRODUCTION

The City of Davis (“City” or “Davis”) files these reply comments to address unfounded criticism of the City’s wireless siting practices, and to discourage the Commission from adopting regulations or legal interpretations that would interfere with City practices that have successfully balanced the interests of the community and the wireless industry. Only the City knows the unique qualities of its neighborhoods, qualities the Commission could jeopardize if it removes local authority with respect to the placement and construction of wireless facilities. A closer look at the two unsubstantiated allegations leveled against the City by PCIA will readily clear up any concern that the Commission may have regarding the City’s treatment of wireless facility applications. Those two issues are that (1) the City is one of many communities across the country that retains “obstructionist[] and problematic” consultants that impose “barriers and prohibitive costs associated with the deployment of wireless facilities;”¹ and (2) the City requires full discretionary zoning hearings for collocation. Neither allegation is true. The City urges the Commission to recognize that such unsworn, unserved and unsubstantiated allegations provide no basis for broader Commission regulation of local practices.

¹ PCIA Comments at Exhibit B, p.11.

The City instead urges the Commission to take this opportunity to re-examine those issues already removed from local control – and in particular RF emissions – to ensure that where local authority is preempted, that the regulations reflect current health and safety information and, in turn, that the Commission provide local entities with the information necessary to effectively respond to citizen concerns on such preempted issues.

II. PCIA MISCHARACTERIZES THE CITY’S REVIEW PROCESS

PCIA includes Davis on its list of jurisdictions that allegedly require applicants for collocations to go through a full zoning review and hearing and obtain a variance or special use permit for each new collocation on a tower regardless of the status of the existing tower.² PCIA is incorrect. The City’s existing Wireless Telecommunication Facilities Ordinance, Davis Municipal Code (DMC) §§ 40.29.0 (“Wireless Ordinance”) provides “uniform standards for the community desired design, placement, permitting, and monitoring of telecommunication facilities consistent with applicable federal requirements.” DMC § 40.29.010(a). The standards in the Wireless Ordinance are “intended to address adverse visual impacts and operational effects of these facilities through appropriate design, siting, screening techniques and locational standards while providing for the communication needs of residents, local businesses, and government agencies.” *Id.* To that end, the Wireless Ordinance contains extensive provisions governing the placement of antenna structures and other wireless facilities, but also includes various exemptions to its discretionary review process, including an exemption for facilities exempt from review pursuant to the Commission’s rules and regulations. DMC § 40.29.060(j).

The purpose of the discretionary review process that the City does apply to wireless applications is intended not to impede wireless deployment, but to make sure the wireless

² *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of PCIA – The Wireless Infrastructure Association and the DAS Forum (A Membership Section Of PCIA) (July 18, 2011) (“PCIA’s Comments”), Exhibit B, 8.

facilities are sited and located in the least intrusive manner. The City has an obvious interest in protecting the character and visual fabric of its neighborhoods – qualities the wireless providers (and certainly PCIA) often have no knowledge of and no interest in. See *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009) (recognizing that the public rights-of-way form the “visual fabric from which neighborhoods are made”). Wireless providers can access a city’s rights-of-way “in both aesthetically benign and aesthetically offensive ways.” *Id.* at 725. “It is certainly within a city’s authority to permit the former and not the latter.” *Id.* Davis’ Wireless Ordinance simply strives to achieve that goal of protecting its aesthetics.

The City of Davis, located 11-miles west of Sacramento, was founded in 1868 and is a university-oriented city closely tied to the University of California at Davis, which was established in 1908 as the “University Farm School.” With continued ties to its agricultural beginnings, Davis has since become a progressive community noted for its small-town style, energy, conservation, environmental programs, parks, preservation of trees, and plethora of bicycles. Pertinent to the Commission’s consideration, the City has since approximately 1971, with very few exceptions, encouraged undergrounding of utilities and prohibited above-ground utilities in new subdivisions. See, e.g., DMC § 36.09.020(g) (including undergrounding of utilities, subject to limited exceptions, amongst required subdivision improvements); see also DMC § 38.01.0 (procedures for establishing an underground utility district); DMC § 8B.02.130 (requiring cable and communications operators to underground aerial facilities in underground areas). For those limited projects where undergrounding is infeasible, such as high voltage wires, the City has restricted the location of such utilities to particular rights of way, generally outside residential areas, the historic downtown, scenic corridors and wildlife preservation areas to limit the aesthetic and other environmental impacts.

The greatest opposition to wireless projects has arisen where providers have ignored such legitimate community concerns and instead tried to bully their way into the City’s rights-of-way and neighborhoods with no notice or opportunity to suggest alternative sites. The City’s

discretionary review process was created to address such concerns prior to construction to alleviate, if not eliminate, community opposition to a project. Without such input, deployment is far more likely to be delayed by neighborhood outcry and even legal challenges. In the City's experience, if a provider is willing to address neighborhood concerns honestly, and to adjust its designs to address legitimate concerns in advance of commencing construction, it is far more likely that opposition will be more muted or non-existent. The contrary is also true: if the City must tell homeowners "we are sorry, but your concerns are of importance to us, but the Commission has adopted a rule that requires us to permit construction without public input," the only remedy will be for neighborhoods to organize opposition to the carriers who will use the towers, poles, nodes or antennas. The fact that the PCIA misses this very basic point suggests that it and at least some of its members need to become familiar with zoning and permitting processes, and why public involvement is ultimately a plus, and not a negative for legitimate providers. This is something that the Commission could perhaps facilitate through its own field hearings; preemption would be a mistake.

Moreover, contrary to PCIA's unsupported allegations, City fully and complies with California Government Code section 65850.6 with respect to the placement of collocation facilities on wireless telecommunications collocation facilities. This state law generally permits collocation where the collocation is consistent with the conditions placed on the underlying facility. For example, if the underlying facility is a stealth facility, the collocation facility would have to comply with the stealth conditions. Likewise, a collocated facility cannot be installed in a way that increases the risk of public injury (as might occur if structures associated with the collocation are not properly shielded by fencing). If collocation is approved as part of the approval of the underlying or base facility, installation of conforming collocation antennas and equipment is ministerial. California's collocation law allows appropriate review up front and expedited installation of conforming antennas. This addresses both legitimate aesthetic concerns of the City and its residents and promotes planning and streamlining of new equipment installation by providers. The preemptive regulations proposed by PCIA would essentially

permit collocation even where it fundamentally changes an underlying structure or created public safety risks. But section 65850.6's conditions do not cause delay, and are hardly excessive. In other words, the Commission's intervention is simply not necessary. Indeed, the City is concerned that federal regulation in this area may hamper cities from experimenting with different models and approaches to spur broadband deployments. Giving localities broad flexibility to try new arrangements – and to modify them to work better or abandon them if they do not work – may be critical to the development of successful deployment and adoption strategies. For example, the City is currently reviewing its Wireless Ordinance and considering amendments that would further encourage collocation sites through a more abbreviated process. An inflexible federal rule will stifle local innovation and hinder deployment of telecommunications facilities.

III. PCIA'S CRITICISM OF THE CITY'S PURPORTED USE OF CONSULTANTS IS MISPLACED AND MISGUIDED.

PCIA asserts that the City and many other jurisdictions “retain consultants indentified by the wireless infrastructure industry as obstructionists and problematic.”³ Where such an allegation came from with respect to the City of Davis is a mystery. With respect to wireless facilities, the only instance that comes to mind is the recent hiring of a consultant with respect to an application for a distributed antenna system (DAS). The proposed DAS project was of particular interest to the community because the applicant was proposing placing some of the DAS nodes within greenbelts and next to residences in neighborhoods with no overhead facilities whatsoever. The applicant, however, was not actually a personal wireless provider but, in the applicant's own words is a “carrier's carrier” that constructs “dumb pipes” for rent by wireless providers. The applicant asserted, among other things, that the City was required to allow the project without further discretionary review because its DAS was necessary to eliminate a

³ PCIA Comments at 23-24.

significant gap in coverage. Although the applicant did not provide wireless services, it propounded studies regarding coverage for a purported “tenant” on the eve of a hearing before the City Council. The City retained an expert to assist it in with reviewing these standards and explaining the applicable state and federal laws and regulations applicable. The City retained the consultant to more quickly evaluate the proposal given the special technical matters at issue that were beyond the expertise of its staff. The consultant was retained to facilitate understanding of the project and determine whether and to what extent exemptions to the City’s discretionary review process were necessary.

The Commission should recognize that it is perfectly appropriate for local governments to use consultants if they choose to do so. Like many local governments, the City has limited resources, and must rely on outside consultants on a range of matters for which it would be inefficient for the City to retain full-time staff in-house.⁴ This is especially true for technical and specialized matters, including those that only infrequently arise under State law. It is certainly reasonable for the City to use a consultant to assist with such matters beyond its scope of expertise, including considerations of gaps in coverage and whether other alternatives might exist that would be more compatible with the community. Retention of such experts has facilitated, not impeded, broadband deployment. The Commission should not interfere with local use of consultants, even assuming it had authority to do so. Certainly, local governments’ limited consultant use cannot justify regulation any more than industry’s use of subcontractors and consultants.

IV. THE COMMISSION SHOULD FOCUS ITS EFFORTS ON ISSUES OF FEDERAL CONCERN SUCH AS RF EMISSIONS

The City supports the comments filed by Montgomery County, Maryland, and joins Montgomery County in urging the Commission to focus its efforts to encourage broadband

⁴ Indeed, if the City were required to hire additional staff, its costs to process applications would inevitably be higher, as well.

deployment, not on regulating local governments, but on issues of federal importance such as education and studies on RF emissions.⁵ These are matters clearly within the Commission's jurisdiction and ones that cry out for federal leadership. With the proliferation of smartphones and other wireless devices, the need for action is more pressing today than ever. As more antennae are deployed, concerns over RF issues are likely to increase, not decrease. The release of new studies such as the World Health Organization's recent study on the potential link between cell phone use and cancer has sparked new concern from the City's community as to whether the Commission's RF emission standards comport with current health and safety information. A failure of the Commission to provide easily accessible and current information merely lends credence to those who oppose any antennae placement. Assisting the City with answering such questions will be far more helpful in furthering deployment of wireless technology than further limiting local planning and zoning review of such facilities.

V. CONCLUSION

The Commission should refrain from taking any action to regulate local government practices based on PCIA's misplaced, misguided criticism of the City. PCIA has not presented anything other than anecdotes and adjectives in support of its claims that broadband is being deterred or delayed. There is no evidence that the City's current policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to the Davis community and would instead stifle efforts to develop innovative and flexible processes. Thus, the City strongly supports the National Associations⁶ in their call for the Commission to defer in these local deployment

⁵ *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of Montgomery County, Maryland (July 18, 2011) ("Montgomery County's Comments"), 40-42.

⁶ *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and*

matters to the experts – the local governments – and to focus Commission efforts on other areas more appropriate for national policy action such as RF emission standards.

DATED: September 29, 2011

Respectfully submitted,

/s/ Harriet A. Steiner

HARRIET A. STEINER
City Attorney
City of Davis, California

BEST BEST & KRIEGER LLP
400 Capitol Mall, Suite 1650
Sacramento, CA 95814
(916) 325-4000

Attorneys for the City of Davis

Wireless Facilities Siting, MB WC Docket No. 11-59, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (July 18, 2011) (“National Associations’ Comments”).